

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:)	ADMINISTRATIVE COMPLIANCE
)	ORDER ON CONSENT
CANDLE DEVELOPMENT, L.L.C.)	
27160 470th Ave.)	
Tea, SD 57064-8112,)	
)	Docket No. CWA-08-2004-0067
)	
Respondent.)	
)	
_____)	

I. INTRODUCTION

1. This Administrative Compliance Order on Consent (“Consent Order” or “Order”) is entered into between the United States Environmental Protection Agency (“EPA”) and the Respondent, Candle Development, L.L.C. (“Candle Development”). The Consent Order concerns the implementation and completion of compliance actions required to address the alleged environmental damages caused by alleged illegal discharges of dredged or fill material at the Candle I property in Lincoln County, South Dakota.

II. STATUTORY AUTHORITY

2. This Consent Order is issued pursuant to the authority vested in the Administrator of EPA by sections 308 and 309 of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1318 and 1319. This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Consent Order is based on the findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which,

among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

III. PARTIES BOUND

3. This Consent Order shall apply to and be binding upon EPA and the Respondent and its agents, heirs, successors, and assigns. The signatories to this Consent Order certify that they are authorized to execute and legally bind the parties they represent to this Order. No change in the ownership or legal status of Candle Development or ownership of the property that is the subject of this Consent Order shall alter Respondent's responsibilities under this Order.

IV. STATEMENT OF PARTIES

4. Except as otherwise provided in Paragraph 5 of Section IV of this Consent Order, the FINDINGS OF FACT AND OF VIOLATION set forth in Section V of this order are made solely by EPA and are not admitted to by Respondent. Except as otherwise provided in Paragraph 5 of Section IV of this Order, in signing this Consent Order, EPA and Respondent understand and agree that this settlement is a compromise of disputed claims and that Respondent's agreement to undertake the compliance actions hereunder is not to be construed or characterized by EPA or any other person or party as an admission of liability on the part of Respondent, and Respondent denies and continues to deny liability for any acts or omissions set forth in EPA's FINDINGS OF FACT AND OF VIOLATION. In order to provide for the complete resolution of the alleged violations of the CWA and without acknowledging any further liability, Respondent consents to the issuance of this Consent Order and agrees to abide by all of the terms and conditions herein and agrees not to challenge the jurisdiction of EPA or the

FINDINGS OF FACT AND OF VIOLATION set forth in Section V of this Order in any proceeding to enforce this Order.

5. Respondent specifically admits those FINDINGS OF FACT AND OF VIOLATION set forth in Paragraphs 6 and 9 of Section V of this Consent Order.

V. FINDINGS OF FACT AND OF VIOLATION

6. Candle Development is a South Dakota limited liability corporation whose address is 27160 470th Avenue, Tea, SD 57064-8112. It is currently in good standing with the South Dakota Secretary of State's office, and its registered agent is James P. Daniels, 27160 470th Avenue, Tea, SD 57064-8112. References herein to "Daniels" shall mean and refer to James P. Daniels solely in his capacity as the managing partner of Candle Development.

7. At all relevant times, Candle Development owned, controlled, and/or operated the property, which contains a stream (the "North Drainageway") and its adjacent wetlands. The property is located in Section 12, Township 100 North, Range 51 West, Lincoln County, South Dakota (the "Candle I property"). The legal description of the Candle I property is:

The East one-half of the Southeast Quarter (E1/2SE1/4), except the south 840 feet of the east 518.57 feet thereof, of Section 12(12), Township one hundred (100) North, Range 51 West of the Fifth Principal Meridian, Lincoln County, South Dakota, according to the Government Survey thereof.

8. The North Drainageway is tributary to the Big Sioux River. The Big Sioux River is and was at all relevant times a navigable interstate water.

9. Respondent acquired the Candle I property on June 10, 1997. It intended to construct a starter-home housing development.

10. On June 16, 1997, Daniels had a conversation with James Oehlerking of the U.S.

Army Corps of Engineers (the “Corps”) about CWA § 404 permits for the Candle I property.

Candle Development had begun work on Phase I of the Candle I property, which apparently did not impact jurisdictional wetlands. Oehlerking told Daniels that Respondent could proceed with a CWA § 404 permit application for the rest of the Candle I property.

11. On August 7, 1997, the Corps received Respondent Candle Development’s CWA § 404 permit application for the non-Phase-I work on the Candle I property. The comment period took place in October 1997, and several persons commented. Peter Gober, Field Supervisor of the South Dakota field office of the U.S. Fish & Wildlife Service, recommended that the permit be either denied or held in abeyance until Candle Development had developed an acceptable mitigation plan using a 1.5:1.0 ratio. A nearby homeowner, Geraldine E. Thurman, was concerned about the Candle I plans causing problems with natural drainage getting to the North Drainageway. The South Dakota State Historical Society had concerns about cultural resources and asked the Corps to request a cultural inventory search. The South Dakota Department of the Environment and Natural Resources (“SDDENR”) said that it would have no objection to the permit, provided that Respondent first submit a “plan to avoid, minimize, or compensate for any adverse impacts directly attributable to the project.” Candace Thomas of the Corps also wrote a memo indicating concerns about (1) the project being near a zoned flood plain, and (2) the possibility that the prairie fringed orchid may be found in the wet areas.

12. The Corps wrote to Daniels on November 3, 1997, requesting an avoidance analysis similar to that specified by SDDENR in Paragraph 11, above. The information was due within 15 days after receipt of the request. The Corps also explained again the requirements for obtaining a CWA § 404 permit.

13. On November 6, 1997, Lance Moran of Daniels Construction called the Corps

office, saying that Daniels Construction was working on the Candle I property and asking how to go about wetlands mitigation. He was told that a letter had just been sent to Candle Development, giving mitigation information and requesting an alternatives analysis.

14. On the following day, November 7, 1997, Daniels asked again for information on wetlands mitigation and stated that he believed Candle Development was in compliance with SDDENR's avoidance analysis concerns. Daniels did not provide either a wetlands mitigation plan or an avoidance analysis.

15. On March 26, 1998, the Corps wrote Daniels, enclosing a list of possible environmental consultants and referring Daniels to the November 3, 1997, letter (referenced in Paragraph 12 above) for mitigation guidance and criteria.

16. The Corps conducted a site visit to the Candle I property on June 11, 1998, and determined that Candle Development and/or its agents had placed unauthorized fill in wetlands on the Candle I property.

17. On July 8, 1998, the Corps issued a cease-and-desist order to Candle Development based on the June 11 site visit. Candle Development was ordered to cease and desist all unauthorized work on the site; formal processing of the CWA § 404 permit was being suspended, and the case was being referred to the Corps' Omaha District Office for further action.

18. On behalf of Candle Development, Daniels wrote to the Corps on July 24, 1998, that Candle Development would present "at least some sort of proposal" during the first week in August.

19. On August 4, 1998, the Corps wrote to Daniels, referring him to the Corps' March 26, 1998, letter providing information about consultants and mitigation.

20. The Corps wrote to Daniels again, on September 24, 1998, stating that if there were no progress toward a mitigation plan by November 1, 1998, it would assume that Candle Development did not plan to submit a mitigation plan, and it would institute an enforcement action.

21. On May 3, 1999, the Corps wrote Daniels that it had discovered that Candle Development's engineer, Schmitz-Kalda and Associates, had failed to submit a mitigation plan. The Corps also stated that if a mitigation plan were not filed by May 20, it would impose a deadline.

22. On May 19, 1999, Candle Development's engineer submitted an inadequate mitigation plan, along with a new CWA § 404 permit application by Candle Development.

23. On November 22, 1999, the Corps notified Daniels that it was instituting an enforcement action, and on December 16, 1999, the Corps notified Daniels that it had referred the case to EPA for enforcement.

24. The activities described in Paragraph 16 of Section V of this Consent Order were performed using common earthmoving vehicles and equipment, including a backhoe, all of which were operated by Respondent and/or by one or more individuals on behalf of Respondent.

25. Respondent is a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

26. A portion of the fill material referenced in Paragraph 16 of Section V of this Consent order is and was at all relevant times "dredged material" within the meaning of 33 C.F.R. § 323.2(c) and a "pollutant" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

27. A portion of the fill material referenced in Paragraph 16 of Section V of this Consent Order is and was at all relevant times “fill material” within the meaning of 33 C.F.R. § 323.2(e) and “pollutants” within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

28. The waterways and wetlands filled and disturbed by Respondent’s unauthorized activities provided various functions and values, including wildlife habitat for birds, mammals, reptiles, and amphibians; water quality enhancement; flood attenuation; and aesthetics.

29. The vehicles and equipment described in Paragraph 24 of Section V of this Consent Order are and were at all relevant times each a “point source” within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).

30. The Big Sioux River, the North Drainageway and its adjacent wetlands referenced in Paragraphs 7 and 8 of Section V of this Consent Order are and were at all relevant times “waters of the United States” within the meaning of 33 C.F.R. § 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

31. The placement of dredged or fill material into the North Drainageway and its adjacent wetlands constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).

32. Section 301(a) of the CWA, 33 U.S.C. § 1311, prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

33. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters which are

defined as waters of the United States.

34. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.

35. Respondent is not and never has been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in Paragraph 16 of Section V of this Consent Order.

36. The activities conducted by Respondent and/or its agents as described in Paragraph 16 of Section V of this Consent Order violate section 301 of the CWA, 33 U.S.C. § 1311. Each discharge of pollutants from a point source by Respondent into waters of the United States without the required permits issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a).

37. Mitigation for adverse impacts to waters of the United States can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.

38. Activities to be carried out under this Consent Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). The mitigation described in Paragraph 37 of Section V of this Consent Order is appropriate to address the actual and potential harm to water quality, aquatic habitat, and wildlife habitat caused by Respondent's unpermitted activities.

39. In order to resolve the violations alleged herein by EPA, Respondent has agreed to comply with this Consent Order and agrees to abide by all of its terms and conditions herein and agrees not to challenge the jurisdiction of EPA or these FINDINGS OF FACT AND OF VIOLATION in any proceeding to enforce this Consent Order.

40. These preceding FINDINGS OF FACT AND OF VIOLATION and the ORDER FOR COMPLIANCE below have been made after consultation and coordination with the Corps' Omaha District.

VI. ORDER FOR COMPLIANCE

Based upon the foregoing FINDINGS OF FACT AND OF VIOLATION, and pursuant to the authority vested in the Administrator of EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED and AGREED:

1. Respondent shall immediately terminate all unauthorized discharges of dredged or fill material, now and in the future, into waters of the United States, unless specifically authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.

2. Respondent has agreed to conduct mitigation activities for impacts on the Candle I property as follows:

a. Create 3.5 acres of wetlands at the Candle I property's detention pond (a 2:1

ratio); and

b. Create 7.5 acres of high-quality wetlands (a 1:1 ratio) on the “Bridgewater” Property owned by D & L Wildlife Properties, L.L.C., an expansion of currently existing wetlands.

3. All mitigation activities shall be conducted in accordance with an EPA-approved mitigation plan prepared by a consultant experienced in stream and wetland restoration whose qualifications are acceptable to EPA. The consultant also shall directly supervise all work performed pursuant to the EPA-approved mitigation plan. A statement of the consultant’s qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Consent Order.

4. All mitigation activities conducted pursuant to this Consent Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in stream and wetland mitigation whose qualifications are acceptable to EPA. A statement of the equipment operator’s qualifications, including professional resume and/or business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Consent Order.

5. Within seven (7) calendar days of any disapproval by EPA of the qualifications of the consultant or equipment operator referenced in Paragraphs 3 and 4 of Section VI of this Consent Order, Respondent shall submit the professional resume of a qualified individual who is acceptable to EPA.

6. Within forty-five (45) calendar days of the receipt of this Consent Order, Respondent shall submit to EPA for review and comment a mitigation plan, prepared by the consultant referenced in Paragraph 3 of Section VI of this Consent Order, for mitigation of the

impacts due to any unauthorized dredged or fill materials at the Candle I property, including any structures, that are to remain in place.

7. The mitigation plan shall be prepared in accordance with *U.S. Environmental Protection Agency – Region VIII Section 404 Enforcement: General Guidelines for Removal and Restoration Plans and Habitat Mitigation and Monitoring Proposal Guidelines*, attached hereto as Exhibit A. In addition, the mitigation plan shall include:

- a. A detailed work plan and schedule for all of the work to be accomplished by the mitigation plan, including the application for any required permits, providing for completion of all aspects of the mitigation work no later than sixty (60) days after EPA approves the mitigation plan;
 - b. Locations and delineations of all wetlands included in the mitigation. The delineations shall be performed in accordance with the procedures in the *Corps of Engineers Wetlands Delineation Manual, January 1987 – Final Report*, including the procedures for atypical situations, and subsequent interpretive guidance published by the Corps;
 - c. Grading, planting, and monitoring plans, measurable criteria for success of mitigation, and provisions for proper disposal of any excess soils or other materials generated during construction and restoration;
 - d. Detailed professional drawings of the mitigation site(s), including plan and profile drawings with control elevations; and
 - e. A description of all costs to complete the mitigation work, including the costs of all studies, consultations, permits, monitoring, and construction.
8. EPA will review the mitigation plan and approve it, approve it with modifications,

or reject it with comments. If EPA rejects the mitigation plan, Respondent shall, within fifteen (15) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.

9. Upon receiving EPA's written approval of the mitigation plan, Respondent shall obtain all necessary permits to implement the EPA-approved plan and then commence mitigation activities in accordance with the approved plan, including the schedule specified therein, and all granted permits. Respondent shall demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.

10. This Consent Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondent shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Consent Order requires a permit from the Corps under section 404 of the CWA. If required, Respondent shall obtain such permit(s) and provide a copy to EPA pursuant to Paragraph 9 of Section VI of this Consent Order prior to initiating any work that is to be performed pursuant to this Consent Order.

U.S. Army Corps of Engineers
South Dakota Regulatory Office
28563 Powerhouse Road, Room 118
Pierre, SD 57501
Telephone: 605-224-8531
Facsimile: 605-224-5945

11. Respondent shall submit three (3) copies of the mitigation plan, all notifications, and related correspondence to:

Monica Heimdal, 8ENF-W
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300

Denver, CO 80202-2466
Telephone: 303-312-6359
Facsimile: 303-312-6409

A copy of the mitigation plan, all notifications, and related correspondence shall also be provided to:

Donna M. Arthur, 8ENF-L
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: 303-312-6954
Facsimile: 303-312-6953

12. In addition to the notification requirement set forth in Paragraph 11 of Section VI of this Consent Order, after issuance of any Corps authorization required for the mitigation work, Respondent shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.

13. Any deliverables, plans, reports, specifications, schedules, or attachments required by this Consent Order are, upon approval by EPA, incorporated into this Consent Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, or attachments shall be deemed a failure to comply with this Consent Order and subject to EPA enforcement.

14. Respondent shall allow access by any authorized representatives of EPA or its contractors, the Corps, the Natural Resources Conservation Service, the U.S. Fish & Wildlife Service, and SDDENR, upon proper presentation of credentials, to sites and records relevant to this Consent Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Consent Order;
- b. To inspect and monitor compliance with this Consent Order; and
- c. To verify and evaluate data and other information submitted to EPA.

This Consent Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site(s), conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

15. This Consent Order shall be effective upon receipt by Respondent.

16. Respondent understands and acknowledges the following:

- a. Compliance with the terms and conditions of the Consent Order shall not be construed to relieve Respondent of Respondent's obligation to comply with any applicable Federal, state, or local law or regulation; and
- b. Failure by Respondent to complete the tasks described herein in the manner and time frame specified pursuant to this Consent Order may subject Respondent to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Consent Order.

17. In the event that Respondent seeks an after-the-fact permit for the activities set forth in the FINDINGS OF FACT AND OF VIOLATION, and upon completion of the tasks described herein, EPA will advise the Corps that the terms and conditions of this Consent Order have been fulfilled.

18. Each party shall bear its own costs and attorneys fees in connection with this matter.

19. This Consent Order constitutes the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in this Consent Order. The parties acknowledge that there are no representations, agreements, or understandings

relating to the settlement of this matter other than those expressly contained in this Consent Order.

20. The undersigned representative of Respondent certifies that he is fully authorized to enter into the terms and conditions of this Consent Order and to execute and legally bind Respondent to this document.

**FOR UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,**

Date: 9/2/04

By: Aundrey C. Wilkins for/
Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice
U.S. Environmental Protection Agency,
Region 8

FOR CANDLE DEVELOPMENT, L.L.C.

Date: 7/28/04

By: SIGNED
James P. Daniels, President
27160 470th Avenue
Tea, SD 57064-8112

CERTIFICATE OF SERVICE

The undersigned certifies that the original and one copy of the attached **ADMINISTRATIVE COMPLIANCE ORDER ON CONSENT** in the matter of **CANDLE DEVELOPMENT, L.L.C., DOCKET NO.: CWA-08-2004-0067** were filed with the Regional Hearing Clerk on September 3, 2004.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Donna M. Arthur, Senior Enforcement Attorney, U.S. EPA - Region 8, 999 18th Street - Suite 300, CO 80202-2466. True and correct copies of the aforementioned document were placed in the United States mail certified/return receipt on September 3, 2004, to:

James P. Daniels
Registered Agent
Candle Development, L.L.C.
27160 470th Avenue
Tea, SD 57064-8112

and to

Howard Kenison, Esq.
Attorney for Candle Development, L.L.C.
Lindquist & Vennum, P.L.L.P.
600 17th Street
Suite 1800 South
Denver, CO 80202-5441

Date Stamped
September 3, 2004

Dayle DeArvil

**THIS DOCUMENT WAS FILED IN THE REGION HEARING CLERK'S OFFICE ON
SEPTEMBER 3, 2004.**